The task of students of Chinese law has shifted. Until now there have been almost no legal texts of the usual type—statutes and court decisions for instance. Students attempted to construct their own pictures of the Chinese legal system on the basis of extremely fragmentary information. No one was very happy about the result. Now this all seems to have changed. On 1 July 1979, the National People's Congress enacted seven statutes which were immediately published. By 1 January 1980 all were in effect. The four most important for students of the Chinese legal system are the Criminal Law, the Code of Criminal Procedure, the Organic Law of the People's Procuracy, and the Organic Law of the People's Courts. These statutes are particularly important in view of the statements that civil and commercial codes and a code of civil procedure will appear. If this should happen, China would have all the basic elements of a western-style legal system. The foreign student could then settle down to the familiar task of comparing the provisions of the Chinese Code with those of the French or Soviet Codes. He could analyze the language and ask himself hypothetical questions. After a while, he would no doubt be able to examine appellate decisions. The study of Chinese law would then be no different from the study of any other legal system.

There are some obstacles to this approach. Normal western legal study assumes that it is profitable to study the language of statutes because it is assumed that the statutes will be applied where relevant and that those applying them will regard themselves as bound by the statutes as interpreted in the usual way. We have no way of knowing whether those statutes will ever be applied in fact. We are certain that only an infinitesimal percentage of the people who will apply them (if anyone does) will known anything at all about law. If the statutes are in fact used they will be used by laymen.

In form they appear to be very ordinary western statutes. The principal one—the Criminal Law—seems to be an abridged version of the 1935 Chinese criminal code that is in effect, more or less, on Taiwan. The remainder set up a western-styled judicial system and procedure. By western standards they are not very well drafted: there are a great many gaps for instance. No doubt a willing and moderately skillful judiciary could make do with them, however, and one could
predict fairly well what would happen. But even if such a body existed, it is not at all clear that it would be permitted to function like a western judiciary.

The new legal developments are constantly being touted as the new socialist legalism and as of enormous benefit to the achievement of the Four Modernizations, etc. But it is not clear that anyone has sat down to consider what the application of these statutes would really entail and what such application would do to Chinese society. One of the problems is that very few of the people who are writing about the law in such glowing terms have any real knowledge of what a western legal system is like, nor have they really thought about China’s. The new statutes have no relation to anything that has ever existed in China except for its very small westernized portion. Their enforcement could, therefore, produce a very radical change in Chinese society. This is not the way they are being talked about to be sure, but any meaningful discussion of the new codes must consider these facts.

The Background of the Codes

The first point that must be made is the obvious one that the traditional Chinese legal system was very different from that of the West. For one thing there were no lawyers and no tradition of legal study. So far as I have been able to determine, there was no legal analysis of the sort we recognize. The formal legal system was concerned primarily with what we could call administrative and criminal matters. It was a system of punishing severely infractions of rules. Law was neither liked nor respected. The word translated as “law” has negative connotations in Chinese such as fear, punishment, and the like.

The system collapsed in the early part of this century with the collapse of the Empire. In the chaotic period between 1911 and 1949, efforts were made to introduce a western-style legal system. Formally one was set up, and codes—mostly copies from the German and Japanese Codes—were adopted in the early 1930s. But the Nationalist government never really controlled the countryside in any depth, and once the war with Japan began, there were, for obvious reasons, few efforts to impose the new system.

There were, it is true, western courts in the Treaty Ports (Shanghai, Tientsin, etc.). The western-style universities had law schools which taught western law or western-style Chinese law. Some of these were very good. A number of Chinese studied law abroad, particularly in Japan. Many Chinese businessmen and other residents in these ports had a good deal of contact with western law. But only the relatively few very westernized Chinese had any part in this life.

With liberation and the establishment of the People’s Republic of China in 1949, all of the western legal institutions were abolished. A court system on the model of that of the Soviet Union was established on paper but it never
functioned as a court system in fact. Instead, criminal matters were dealt with by the Security Administration—the police—as administrative matters. Prisoners were arrested, questioned, detained, and eventually sentenced or released in accordance with administrative rules concerning whose precise content both we and the ordinary Chinese can only guess. Occasionally, a proceeding would be held before a court at which the prisoner would be found guilty and sentenced. But in every case that I have been able to investigate it is pretty clear that both the finding of guilt and the sentence were determined in advance. When there was a "trial" before the court, it was simply a theatrical performance, that was put on for educational purposes. No real decision was made there—and such "trials" were rare. This was true prior to the Cultural Revolution and was also true thereafter. The difference was that a number of those who participated in jailing others prior to 1966 were themselves jailed subsequently. It is my belief that this system was quite regularized and controlled. The police did not act capriciously. They acted in accordance with rules and kept very complete records. But the rules were internal bureaucratic regulations, not published statutes.

Such a procedure fitted the general scheme of government of Maoist China, particularly since these rules were not used independently of circumstances. Whether a particular act—say the unauthorized taking of a quantity of rice—was regarded as criminal, and if so, as serious, depended on the effect which it was judged to have on society at that time. This in turn depended on the general situation—whether there was famine or a campaign against theft, for example. It also depended on the class background of the actor. A theft of a small amount of grain by a peasant who freely confessed at a time of comparative plenty and good public order might well be punished mildly with what we might term a warning. The same act committed by a former landlord during a time of scarcity in the midst of an anti-theft campaign might result in a sentence of several years of reform through labor—particularly if the accused showed a recalcitrant attitude.

Indeed it is my opinion that the Chinese ideal during the Maoist years was the precise reverse of what is sometimes said to be that of the West; that is, that the ideal criminal law is a system of universal norms that are applied irrespective of person and circumstances. Of course, our ideal is frequently not attained. Statutes are selectively enforced—as in the case of the periodic round-ups of prostitutes and drug addicts. Certain social groups are often treated differently from the majority. Still, there is a general notion that "the law" is an impersonal and impartial presence that will (or ought) to punish the guilty.

In China during the Mao period, on the other hand, what we call criminal law was simply one of many aspects of the state’s activity that was designed to restructure society in order to enable communism to appear as soon as possible. Crime was regarded as an unfortunate transitory social phenomenon. It was the product of feudalism and capitalism, like greed. It was believed that there would
be much less of it when the relations of production were changed with land reform, nationalization and the like. The most important legal text is sometimes felt to have been Mao's essay "On the Correct Handling of Contradictions Among the People". If someone performs an act that we would regard as criminal, it should be analyzed to see if it represented a contradiction between the enemy and us or a contradiction among the people.\(^\text{20}\) If the former, it would be handled drastically—by "dictatorship" (though reform was not regarded as impossible). If the latter, then the emphasis was to be on making the miscreant see the evil of his ways, on reform. Persuasion or education—"Brain-washing"—was integral to Chinese criminal jurisprudence.\(^\text{21}\) The entire system was supposed to be simply a technique for dealing with certain unfortunate social phenomena. It could be regarded as part of the educational system. Obviously rigid standards were no part of it. The aim or end mattered. Practicality was the test for the means.

To be sure, this ideal was also not always adhered to in practice. China was and is a highly centralized bureaucracy. The lower-level officials in the Security Administration, the procuracy, and the courts might be Party members but they were also bureaucrats. One of the chief characteristics of a bureaucrat is that he works according to rules. It is easier and it keeps one out of trouble. Since the usual criminal acts—thefts, killing, rape, for instance—were regarded as criminal by Chinese traditionally, and also by the PRC government, the likelihood is that there was considerable uniformity of treatment. Still, the ideal of a flexible approach was always present and often realized.

There were other elements in China. Among westernized intellectuals there were some who had a strong affection for the "rule of law".\(^\text{22}\) At least some cadres who had studied in the Soviet Union regarded a formal legal system as appropriate for a socialist society on the way to communism.\(^\text{23}\) The framework for such a system existed on paper. Some law schools continued to function after the Cultural Revolution, and there were legal institutes for training members of the Security Administration which gave some general legal training.\(^\text{34}\) There were legal periodicals which published theoretical articles on a variety of subjects—none having much relation to the real world of China. There were drafts of codes.\(^\text{25}\) But these strains of thought had little influence in actual events or practices.

One problem with this system is that whenever there was a change in "line", there would probably also be changes in the definition of proper attitudes and conduct. Unless one was very swift to change too, one might very easily be caught out. There were a great many changes.\(^\text{26}\) Most Chinese intellectuals ran afoul of the legal system as a result. That might not have produced a political result, but during the period 1966-1976, a substantial percentage of the Party members, including persons at the very highest level, were punished in varying degrees.\(^\text{27}\) One of the results of Mao's death, and the power struggle that took
place thereafter, is that those who were victims of the system prior to 1976 now control it, at least at the top. One thing which they seem to be determined on is that they are not going to be put back in jail or worse by a bunch of crazy kids—Red Guards or whatever. It would seem that they really did not enjoy being in jail at all. Hence, perhaps, the new criminal laws.  

The Content of the Criminal Law

These laws do not explicitly reveal anything of this background. The Criminal Law is, in form, as mentioned above, simply a western penal code drafted on the German model. That is, it has a General Part which includes the basic concepts of the entire Code and the provisions and notions that are common to all crimes. This is followed by a Special Part in which particular crimes are treated one by one.

The basic concepts are also those of western law. They do not seem to have any trace of Marxist influence. The code is based on the Person or Rights-bearer who is generally responsible for his acts if he has intended them. If the injury is unintentional or if he is incapable of having an intention (because of insanity, infancy, and the like), he is not responsible. A distinction is made between attempts and consummated acts. Generally speaking, crimes committed on Chinese territory are subject to Chinese law. Some crimes committed abroad by Chinese are punishable by Chinese law. Standards for punishments are set out. That is, the different types of punishments are listed. In order of severity, they are: surveillance; detention; fixed term imprisonment; life imprisonment; death. Supplementary punishments are: fines; deprivation of political rights; confiscation of property.

There is a provision for applying the code by analogy where an offense is not clearly provided for. I do not know the source for the rule in this law, but it may be worth noting that there was a similar provision in the Ch'ing Code.

In the Special Part, particular crimes are defined and their punishments given. The usual crimes—private crimes, or the common law felonies as it were—are included and their elements are western. Thus homicide is divided into intentional and negligent killing. The same division is made for assault and battery. The theft provisions are written in a way that is difficult for a Westerner to understand though they probably reflect a western influence. They seem to provide for the three types: theft with force or threats; theft by "stealing, swindling, and plundering"; and "extortion". Provision is made for increasing the penalty in accordance with the amount taken.

There are a number of sex crimes. For example, rape and statutory rape; adultery with a serviceman's spouse; pandering; the manufacture and sale of obscene books. The destruction of property—presumably including arson,
although arson of public property is considered separately—is a crime.

The definitions of the crimes or rather the lack of definitions would be extremely troublesome to a westerner who was asked to interpret this law. The larceny statute indicates the problems. In both the BBC and FBIS translations it reads:

"Anyone who takes away a relatively large amount of public or private property by stealing, swindling, or plundering will be sentenced to imprisonment for not more than five years, detention, or surveillance."

Even if one translated differently—"larceny" for "stealing", "fraud" for "swindling", and "looting" for "plundering", for instance—one would not have a legal definition of any term. Moreover, how does this crime differ from Article 150, "robbery... by force, threats, or other means" (emphasis supplied).

But those problems aside, this portion of the statute is simply a western criminal statute. The interesting thing about the Special Part is that the bulk of the provisions are devoted to what we might call public crimes. Some are crimes that one would find in any western code: espionage, treason, forgery, insurrection, and the like. Just as in the case of the private crimes, the definitions are, by our standards, sketchy. Still, these are all familiar crimes, and the definitions, to the extent that one can figure them out, seem to be what we apply to the same acts. The two categories that are different are counter-revolutionary activities and what one might call Cultural-Revolution crimes.

Counter-revolutionary crimes include what we would call treason, but they also include: organizing or leading a counter-revolutionary group; organizing and utilizing feudal superstitious beliefs to carry out counter-revolutionary activities; inciting the masses to counter-revolution. It might be noted that the language of the section on "feudal superstition" is similar to that which was used under the Ch'ing Code to prohibit Christian missionary activity. It could be used to prohibit any religious activities. And may be so used if the recent benign attitude towards religion should revert to the previous hostility.

What I call Cultural-Revolution crimes—of course this is my phrase and not that of the Chinese—are found throughout the Special Parts. By this I mean provisions that make criminal behavior that is associated with the activities of the supporters of the Cultural Revolution such as the Red Guards. These groups are now usually denominated, "Lin Biao and the Gang of Four and their followers". I would include in this group: damage or theft of state property; sabotage to trains, motorcars, trams, etc.; extracting confessions by torture; gathering a crowd for beating, smashing, and looting; bringing false charges; unlawful incarceration; unlawful surveillance; "seriously insult[ing]" another by inter alia the use of big character posters (a common device in the Cultural Revolution); the making of false charges by functionaries against those who have "filed law suits, appealed or made criticism". Possibly also: "obstruct[ing] a state functionary from performing his duties"; "disrupt[ing] public order by any
means whatsoever";"75 "assembling a crowd to disturb order";"76 "incit[ing] group fighting";"77 "intentionally damag[ing] valuable cultural relics";"78 "forg[ing], alter[ing], steal[ing], plunder[ing], or destroy[ing] the documents, credentials, or seals of state organs, enterprises". Some of these provisions may well have existed in the drafts that were prepared prior to the Cultural Revolution, but since they deal explicitly with the type of behavior which is associated with the Cultural Revolution, and which is excoriated in the press today, the connection seems likely.

Be that as it may, the Code is, as indicated, a western-style penal code. Western lawyers would not like its style of drafting. They would particularly dislike the missing or loose definitions. But every western lawyer—anyway every American lawyer—has had to cope with badly drafted statutes. An American lawyer might curse at this statute, but he could work with it without developing any radically different techniques.

Since a western-style code of criminal procedure, as well as organic acts for the courts and procuracy were enacted at the same time as the Criminal Law, the formal enforcement structure is also western. It is a system in which in the usual case the Security Administration will investigate crimes and collect evidence. If it decides to apprehend and examine a particular suspect, it must get the approval of the procuracy. If it feels the matter warrants trial, it will refer the matter to the procuracy which will conduct its own investigation, and, if it agrees, will refer the matter to the court for trial. The court will consider whether a trial is warranted. The trial, if it occurs, will normally be before a judge and two assessors. It is not clear exactly how it will be conducted. It seems to be contemplated that the first step is for the accused to be examined by the court and possibly by the procurator, the injured party, as well as the plaintiff in any civil action that is to be tried with the criminal case. Apparently, the procurator will then present the evidence and question witnesses, if any, though the court and accused may also do so. The accused is permitted to argue about the evidence. It is not clear if he can present evidence on his own. The court then decides. One appeal is permitted to the accused as of right. The procuratorate may also appeal. The appellate court decides on questions of both fact and law. Further appeals seem to be possible in important cases. Death penalties have to be approved by the Supreme Court. There is no requirement that any person involved—judge, procurator, or attorney—have legal training.

**Prognosis**

Despite the existence of all the apparatus, we do not know whether any real effort will in fact be made to apply it as written. We do not know what sorts of crimes (problems) exist in China, and we do not know what sort of training those
who administer the law will have had. We know that very few of them will be fully trained as jurists. If special training institutes are established, very few of the instructors will be jurists. There simply are not enough of these to go around. If the Code is in fact enforced in the manner that is apparently intended, it will no doubt be interesting from a jurisprudential point of view to see what sort of legal system laymen create. But it is impossible to say now what this will be. Lawyers simply have no way of predicting what nonlawyers will do with their techniques. Particularly nonlawyers who have never even heard of law. One must remember that even the sort of legal consciousness that lay Americans have from watching Perry Mason and similar courtroom dramas is missing. Neither the dramas nor the courtrooms exist.

In my view, the odds on the Code having much meaning are not high, at least over the short-run. It is not, after all, as though the Chinese had no legal system. They do, and it has seemed to work pretty well for the last 30 years. All of the people who administered it are probably still in situ. That is, the personnel of the Security Administration are essentially still much the same. They presumably have some power still in Peking and probably a great deal more at the local level. Are they going to be willing to subordinate themselves to the procuracy or the courts? There are several obstacles. One is that the basic unit of Chinese bureaucratic organization is not the Ministry but the “system” of ministries that are related in function—industrial production for example—and that are coordinated in operation. Prior to 1966 the Security Administration, procuracy, and courts constituted the Political-Legal System. Personnel were transferred within this system. The transfer was usually from the Security Administration to the courts. The Security Administration was the largest part and was dominant. To the extent that the courts and procuracy functioned, they coordinated their activities with those of the Security Administration. Are the courts and procuracy going to be able to escape this domination by the Security Administration? One determining factor will be what the Party wants.

Obviously the most important organization in China is the Communist Party. Generally speaking, the important decisions are always made by the Party. Party Members in an organization will dominate that organization. We know that the top level of the Party has stated that it approves the new legal system, but it is not at all clear that such approval is shared by members at the local level. The legal system is regarded as a weapon which those who regard themselves as having been mistreated by the Gang of Four can use against that group. But it seems pretty clear that the Gang of Four is still well represented in the local Party organizations. This was almost inevitable in view of the fact that one of the purposes of the Cultural Revolution was to purge the Party and replace many members. Unless there has been a much bigger purge since 1976 than I have seen any indication of, most of those Gang of Four appointments are still there. Are they really going to push this new system?

Moreover, how sincere is the top level? As I have indicated, it is my view that
one of the principal motivating factors behind the new system is a reaction against the Cultural Revolution by those who regard themselves as having been mistreated during it. Wang, let us say, wishes to make it very difficult for anyone to put him in prison, and he regards an open statement of the only allowable basis for imprisonment—a criminal code—as a good way of doing this. But so long as Wang and his friends remain in power they are not likely to be in any danger. Moreover they are committed to a lessening of ideologies. Presumably, the class struggle is to be played down.\textsuperscript{101} If there are no big changes in ideology then punishment for ideological crimes is unlikely. The persons most likely to be prosecuted for ideological crimes are the Gang of Four—the ultra leftists. How much due process are they going to receive? Even if the letter of the law is followed, there are innumerable provisions which permit a very loose interpretation. For example, the definition of counter-revolutionary act could easily be interpreted to mean any act that is deemed by the present regime to be contrary to its policies. It reads (Art. 90):

"Counterrevolutionary offenses are those for the purpose of overthrowing the political power of the dictatorship of the proletariat and the socialist system and jeopardizing the People's Republic of China."

When some of the other articles that punish a counter-revolutionary act are read in conjunction with it, there is little that could not be justified (always assuming anyone wished to bother to justify). Thus, Article 102 provides:

"Any of the following acts carried out for counterrevolutionary purposes will be punishable by fixed-term imprisonment, detention, surveillance, or deprivation of political rights for not less than 5 years:
1. Inciting the masses to resist arrest and violating the law and statute of the states; and
2. Using counterrevolutionary slogans, leaflets, or other means to spread propaganda inciting the overthrow of the political power of the dictatorship of the proletarian and the socialist system."

(emphasis supplied)

There is, however, one rather interesting possibility. One of the principal purposes in the publication of the Codes and in the new pro-law movement is a desire to establish a society that runs by rules—rules at work, rules at school, economic laws. An orderly society. Full-dress criminal trials that are widely publicized—even televised—are pretty clearly an educational tool to help achieve this end.\textsuperscript{102} The results of the particular trial are of course pre-determined. There is no real question of guilt. Nor even (in my view) of the sentence to be awarded.\textsuperscript{103} But as most Chinese become aware of this sort of procedure, they may well come to expect a real trial as a necessary prerequisite to conviction. Failure to provide trials could give rise to very serious social unrest. I do not know if this will happen, but it could. Consequently, while I do not foresee the establishment of a real functioning western-style legal system in China in the near future, I do think that it is possible that legal consciousness is coming into being, and this may have very interesting consequences.\textsuperscript{104} I also think that this may be exactly what some of the backers of the current movements have in mind.
Another Approach to Interpretation

The discussion so far has considered the Code as if it were what it appears to be: a western-style code. This is the way the Chinese present it. The question arises, however, what happens if one treats it as if it were a typically Chinese statute. By this I mean a statute like those that were collected and published in the Collected Statutes of 1949-1963.\textsuperscript{105}

These statutes cover a great variety of subjects and there are many different types. For the most part, however, they are declarations of policy that are made by upper-level administrators and are directed to lower-level cadres. They indicate the government policies and the way they are to be carried out. For example, a common statute was one that was designed to promote the production of a particular agricultural product, such as cotton. The statute would begin with a statement of the reason for concern—that cotton was required by industry both to provide for domestic needs and to produce foreign exchange. The general device for dealing with the problem is set out—a change in the relation between the price paid for cotton and for grain (cotton is made more profitable for the farmer to grow). The price ratios are set out. The statute concludes with general directions to the cadres on the sort of education campaigns they should conduct among the masses (or among lower level cadres) to see that the goals are achieved.\textsuperscript{104} Similar statutes exist for everything from a directive of the First Ministry of Machine Building on strengthening the management of equipment\textsuperscript{107} to a provisional measure of the Ministry of Supervision on the handling by state supervisory organs of situations involving citizens' accusations.\textsuperscript{108}

The implementation of the policy will frequently require additional directives—oral or written—and many meetings at various levels. The technique is vividly described in William Hinton's \textit{Fan Shen}.\textsuperscript{109}

How does this sort of statute relate to the Criminal Law? While anything one says is guess work, an obvious place to start would seem to be the first two sections of that law. These provide:

\textbf{Article 1}

The criminal law of the PRC takes Marxism-Leninism-Mao Zedong Thought as its guide and the Constitution as its basis and adheres to the principle of combining punishment with leniency. It is drawn up in the light of the actual situation and concrete experience gained by the people of all nationalities in our country in exercising the people's democratic dictatorship, that is, proletarian dictatorship led by the proletariat and based on the alliance of workers and peasants, and in carrying out socialist revolution and socialist construction.

\textbf{Article 2}

The task of the PRC's criminal law is to use punishment to combat all counterrevolutionary crimes and acts of criminal offenses, defend the dictatorship of the proletariat, protect socialist property of the whole people and of the collective and legislative private property. This law is used to protect the personal rights, democratic rights and other rights of citizens, maintain public order and order in
production, work, teaching, scientific research and the life of the people and insure the smooth progress of the socialist revolution and socialist construction.

Language of this sort is normally ignored in the interpretation of American statutes, but it is frequently the most important part of those from China. One way one could interpret these articles is to say that the purpose of this statute is contained in Article 2. It is to maintain public order. In other words, the purpose of the criminal law is to eliminate crime—disorder—in order to help achieve socialism. For socialism one might substitute the Four Modernizations since these are the most important elements in achieving socialism at the present time. At other times an aim that might be equally or more important is the control of counter-revolutionary activity. That is, activity that is regarded as threatening to the government. Or particular problems or crimes might be felt to require special attention. For example, corruption, pilferage from industrial plants, contact with foreigners. The Criminal Law indicates the general framework within which such specific social aims might be achieved. Various techniques could be used to ensure that the emphasis desired by the top-level was reflected in the actions at the bottom.

In such a system, one would expect everyone concerned to regard himself as an administrator whether he was called judge, procurator, or policeman. There is considerable evidence that at present (January-June 1980) that is just how the political-legal officials do regard themselves. And how others regard them.106

This does not mean that the system would not produce “justice” in the sense that the guilty would be convicted and appropriately sentenced and the innocent freed. But is would not be the Rule of Law as we know it.

There are probably many other ways of viewing the new penal code. What is the correct way is, at the moment, anyone’s guess. There seems to be considerable attention being given to the law.111 Consequently, it is unlikely to become a dead letter immediately. If it continues to have a fair amount of attention devoted to it, it is bound to be important in affecting Chinese thought. What the result will be is quite unclear. All one can do at the moment is pose questions. The answers will probably be slow in coming.
NOTES

1. As will, I trust, be obvious from the text, it is my view that it is impossible to say anything about Chinese law that is not essentially simply the personal opinion of the author. I have used phrases such as “I believe” and “it is my opinion” throughout the text, but I should like to insert a general caveat here. This is very much a personal view of the meaning of the new code.


4. They were: The Organic Law of Local People's Congresses and Local People's Governments at Various Levels; the Electoral Law of the National People's Congress and Local People's Congresses at Various Levels; the Organic Law of the People's Courts; the Organic Law of the People's Procuratorates; the Criminal Law; the Law of Criminal Procedure; and the Law on Joint Ventures with Chinese and Foreign Investment. SWB 2d Series FE/6157, 3 July 1979 at C/I. The statute on Joint Ventures went into effect immediately, the remainder on 1 January 1980.

5. See e.g. “China's Socialist Legal System”, 22 BR, 12 January 1979, at 25, 29-30: “The strengthening of the socialist legal system should include better legislative work ... Some 30 codes and regulations need to be drafted right away ... Then, there is the civil code ... [Laws] ... on economic work, including those for the people's communes and factories, fulfillment of contracts, protection of forests, grass lands and the environment will be drafted and gradually perfected.” It is not certain, however, that the new statutes will appear soon. As of this writing, 1 June 1980, no major statutes have appeared after the original seven. During a visit to China in July-August 1979, I heard some doubt expressed by persons within the legal system as to the advisability of proceeding immediately with a civil code. The failure to enact supporting legislation such as tax and labor laws has dampened enthusiasm for joint ventures. See “China Ventures Lag as Investors Await New Laws”, 2 AWSJW, 3 March 1980, at 4. This is true even among the Japanese who might be supposed to be less law-conscious than Americans. See “Japan, China Agree to Boost Political and Economic Ties”, id., 2 June 1980, at 1, 20. Liu Chu, a member of the Foreign Investment Commission, has indicated that foreigners should go ahead and enter into joint ventures without worrying too much about formal laws. “China Urges Investors to Test the Water While Waiting for Laws”, id., 21 April 1980, at 1, 18. Nevertheless it seems likely that many new statutes will appear before too long. In 1979-1980 there are said to have been approximately 3000 law students and 11,000 students in special two-year courses, FBIS-CHI-79-091, 9 May 1979, at L18-L19. There are more full-time law students in the Borough of Manhattan than in all of China.

6. At the time of the promulgation of the new laws, it was said by a former dean of the Beijing Institute of Political Science and Law that the largest number of lawyers practicing in China after liberation was under 3000. He said at least 10,000 would be needed. Probably many times that. As he pointed out, “China has more than 2000 counties and I think each county needs at least three professional lawyers in addition to those in cities.” “Comments by Noted Jurist”, FBIS-CHI-79-132, 9 July 1979, at L8, L9. But in view of the small number of lawyers there are at present the system will have to function with laymen, or at best, para-legals.

7. There is a widely available translation in 2 A Compilation of the Laws of the Republic of China, 181 (1967). “More or less” because Taiwan is regarded as being in a state of siege and in consequence martial law, administered by the Garrison Command, is applied whenever the government characterizes a case as subject to that system. It is usually proceedings in the military courts which give rise to the much criticized political trials, as in the recent trial of the eight members of the Formosa Magazine Association for riots in Kaohsiung. See Cohen, “From Harvard's Halls to Prison in Taiwan”, 2 AWSJW, 19 May 1980, at 10.

8. For a brief description of criminal procedure, see infra at n. 80-95.

10. See the speech given on the new laws at the second session of the Fifth National People's Republic Congress where they were enacted, by Peng Zhen, Director of the Commission of Legislative Affairs of the National People's Congress's Standing Committee. He said:

"...[S]ince the beginning of 1979, we have shifted the focus of the work of the whole nation to socialist modernization... In line with this historic change, we must conscientiously strengthen socialist democracy and the socialist legal system. Without a sound socialist legal system, a sound socialist democracy can hardly be realized... Even now in some localities and units, the enthusiasm and initiative of the people are still held back and their right of person and democratic and other rights are not always secure. All this shows that in order to give full play to socialist democracy, it is imperative to gradually perfect the socialist legal system so that in whatever they do the 900 million people will have rules and regulations to go by and bad characters and bad acts will be restrained and punished. Therefore, people are craving for law, and the people of the whole country are eagerly demanding a sound legal system."

SWB 2d Ser FE/6158, 4 July 1979, at C/1B. See also the introductory speech on 18 June 1979 by Ye Jianying, Chairman of the Standing Committee of the Fifth National People's Congress at the opening of the second session where these laws were passed. He said:

"The people want to strengthen and improve China's socialist legal system. An improved legal system can effectively guarantee the people's democratic rights provided for by the Constitution and constantly develop stability and unity and a lively and vigorous political situation in the interest of socialist construction. Following the development of economic construction, we need all kinds of economic laws. The NCP must see to it that conscientious investigations and study and careful discussions are carried out and necessary laws formulated so that these laws truly represent the will of the people, reflect the supreme interest of socialism and the dictatorship of the proletariat, and conform to the needs of the growth of socialist economic construction. The laws must be firmly implemented after they are promulgated. The NPC and local People's Congresses at various levels must all play an important part in upholding the dignity of the socialist legal system."

SWB 2d Ser FE/6146, 20 June 1979, at C/7.

11. That is, the new statutes are western and only the small percentage of Chinese who lived in the westernized parts of China, such as Shanghai, prior to Liberation, had any experience with such laws.


13. Professor Li makes the interesting point that the only word the Chinese had for what we might call a lawyer is best translated as "litigation trickster". Id., at 19, and see Li, "Reflections on the Current Drive Toward Legalization in China" in Surrey (ed.), A New Look at Legal Aspects of Doing Business in China 81 (1979). Such a term does not do anything to increase enthusiasm for lawyers.


15. One of the first acts of the new government was to repeal the existing laws. Common Program of the Chinese People's Political Consultative Congress, Art. 17 (this was the provisional constitution in force from 1949-1953).


17. I have discussed this at greater length in Jones, "A Possible Model for the Criminal Trial in the People's Republic of China" supra note 12.

18. This statement is based on the impression I received from interviewing refugees in Hong Kong in 1975. For an example, see also Item 239, Cohen, 527 where a worker received a suspended sentence for adultery because of his class and record.

19. I take this to be the spirit of the statement in the Massachusetts Constitution Art. 30, that there is
separation of powers in the commonwealth "to the end it may be a government of laws and not of men".

21. Id., at 389, "Administrative regulations and the method of persuasion and education complement each other in resolving contradictions among the people."

22. This seemed to come out in the Hundred Flowers Campaign in 1957. See Cohen, 14, 49. See also M. Meisner, Mao's China 188 (1977).

23. See Cohen, 11-12. See also the speech by Dong Bi-wu, "The Legal System of China" in Current Background, 20 September 1956 (U.S. Consulate Hong Kong).


25. According to Peng Zhen, supra note 10, the Criminal Code discussed here is the thirty-third draft of a code that went through thirty drafts prior to the Cultural Revolution.

26. For example, the Hundred Flowers Campaign (1956); the Anti-Rightest Campaign (1957); the Great Leap Forward (1957); the Socialist Education Campaign (1964); the Cultural Revolution (1966); the Anti-Gang-of-Four Campaign (1976).

27. Notably of course the most powerful member of the present government, Deng Xiaoping.

28. Obviously this is just my opinion. Some of the evidence on which it is based consists of statements in the speeches made at the time of the promulgation of the new codes such as that of Peng Zhen, supra note 10. See also the discussion of the "debate" at the National People's Congress over whether or not to permit big character posters, the Beijing Review reported:

"[a] forty-six-year-old peasant said: I propose we ban big-character posters because:
"—during the Cultural Revolution, many people had put up big-character posters all over the place to promote their bourgeois factional setup and to knock out their rivals;
"—big-character posters were exploited by some people to libel others, to smear people as widely as possible, and to create chaos;
"—big-character posters were a big waste of ink and paper."

....

"After the gang of four was smashed, he said, no one put up a single big-character poster, yet democracy flourished and production, too."

22 BR, 13 July 1979, at 21.

29. The Table of Contents is as follows:

Part I: General Provisions
Chapter I: Guiding Ideology, Task and Scope of Application
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Chapter I: Counterrevolution

Chapter II: Violation of Public Security

Chapter III: Acts Against the Socialist Economic Order

Chapter IV: Acts Against the Personal and Democratic Rights of Citizens

Chapter V: Encroachment on Property

Chapter VI: Acts Against Public Order

Chapter VII: Acts Against Marriage and the Family

Chapter VIII: Malfeasance

30. Article 11 defines intentional offenses; Article 12 defines negligent offenses; Art. 13 provides: "An action which objectively results in harm due to irresistible or unforeseeable factors rather than due to one's intention or negligence is not deemed a crime."

31. Art. 15.


33. Art. 16 provides for mitigating the penalty of persons who are deaf-mutes Art. 17 makes self-defense an excuse. Art. 18 provides a defense of emergency.

34. Arts. 19-21.

35. Art. 3.

36. Art. 4 provides:

"The criminal law is applicable to the following offenses committed by Chinese citizens abroad:
1. Counterrevolutionary offenses;
2. Counterfeiting of national currency (Article 122) or valuable securities (Article 123);
3. Embezzlement (Article 155), taking bribes (Article 185), or betrayal of state secrets (Article 186); and
4. Posing as a state functionary to swindle and bluff (Article 166), or forging documents, credentials, and seals (Article 167)."

In addition Art. 5 provides:

"Any Chinese citizen abroad who has committed an offense not mentioned above is liable under the criminal law if the minimum penalty for such an offense is not less than 3 years imprisonment according to Chinese law, unless the act is not punishable by law in the foreign state where it was committed."

37. Art. 28.

38. Art. 29.

39. Art. 79.

40. See D. Bodde & C. Morris, Law in Imperial China, 32, 175-178 (1967).

41. Art. 132 punishes "voluntary homicide". Art. 133 punishes "manslaughter". Literally, "negligently kills another".

42. Art. 134 punishes "intentional assault and battery". Article 135 punishes one who "unintentionally causes severe injury".

43. Art. 150.

44. Art. 151.

45. Art. 154.

46. This is my interpretation of "grave cases" (Art. 150.2. If the case is "grave", the 5-10 years of 150.1 increases to 10 years to death). Art. 151 punishes anyone who takes a "relatively large amount".

47. Art. 139. The age of consent is 14.


49. Art. 169. See also Art. 150: forcing a female to engage in prostitution.

50. Art. 170.

51. Art. 156.
52. Art. 105.
53. Art. 151.
54. These are the definitions in the *Glossary of Applied Legal Terms* prepared by the Chinese University of Hong Kong (1975).
55. *E.g.* Art. 91 punishes colluding with foreign countries; Article 92, "plotting to overthrow the government"; Art. 93 inducing an official to defect; Art. 97 espionage.
56. Art. 120 forging state supply certificates; Art. 122 forging currency; Art. 123 forging checks; Art. 124 forging train tickets.
57. Art. 102.
58. For example, Art. 120 reads:

"Serious cases of forgery and reselling of planned supply certificates to make money will be punishable by fixed-term imprisonment of not more than 3 years or detention. They can concurrently or exclusively be sentenced to fines or have their property confiscated. Ringleaders of the above offense or those with particularly serious cases will be sentenced to fixed-term imprisonment of not less than 3 and not more than 7 years and can concurrently be sentenced to have their property confiscated."

59. Art. 98.
60. Art. 99.
61. Art. 102.
62. Art. 162 of the Ching Code spelled it out. It provided that "magicians who falsely call up devilish spirits, who write charms, spread water in offering imprecations, act by means of a fabulous bird... or call the sages... or adherents of... any sort of false religion or those who... simulate virtuous actions and trouble the people... shall be punished." This was used to punish Christian missionaries—even to execute them. See G. Boulaux, *Manuel de Code Chinois* 365 para. 788 (1924, Taiwan Rprt. 1966). Freedom of religion is now clearly a good thing. See "Freedom of Religions Belief Reaffirmed", 22 BR, 28 April 1980, at 8. Members of the party are still expected to be practicing atheists, however. See "Party and CYL Members Should Not Have Religious Beliefs", FBIS-PRC-80-095, 20 May 1980, at T2.

63. Art. 100.
64. Art. 107.
65. Art. 136.
66. Art. 137.
68. Art. 143.
69. Art. 144.
70. Art. 145.
71. Art. 146.
72. Art. 147.
73. Art. 148.
75. Art. 158.
76. Art. 159.
77. Art. 160.
78. Art. 174.
79. Art. 167.
80. Code of Criminal Procedure, Arts. 3 and 13.3.
81. *Id.*, at Art. 45. The Chinese make a distinction between "detain" and "arrest". It is not clear to me if "apprehend" is different from "detain". "Arrest" seems to have more the meaning of "indict". That is, it is a formal accusation of crime made after intensive investigation and approval by both procuracy and the court. *Id.*, at Arts. 45-49, 51. This distinction existed prior to the Cultural Revolution. See Cohen, 28-29. The Code of Criminal Procedure contemplates the "arrest" of those who are already being "detained" in prison. See Art. 48.
82. Code of Criminal Procedure, Art. 93.
83. *Id.*, at Art. 95.
84. *Id.*, at Art. 108.
85. *Id.*, at Art. 105.
86. *Id.*, at Art. 114.
87. *Id.*, at Art. 115.
88. *Id.*, at Art. 118.
89. Article 117 provides:

"During a court hearing, the persons concerned and the advocate have the right to request the court to call new witnesses and order the production of new exhibits and to apply for reidentifications or reexaminations. The court should decide on whether or not to grant permission for the above-mentioned requests."

Art. 118 provides:

"The investigation by the court should be followed by statements of the public prosecutor and the injured party; then it is the turn of the accused to make a statement and defend himself and for the advocate to speak in defense of the accused. And the parties may debate with each other. After the debate is declared closed by the presiding judge, the accused has the right to make a final statement."

One could, it seems to me, find that it is contemplated that the accused may introduce evidence, but it is not very clear.

90. *Id.*, at Art. 120.
91. *Id.*, at Art. 129.
92. *Id.*, at Art. 130.
93. *Id.*, at Arts. 134, 136.
94. This is how I interpret the meaning of Articles 148-150, review of "validated judgment of ruling". That is, that anyone who is dissatisfied with the decision of the appellate court may appeal further but execution of the sentence will not be delayed pending decision.
95. *Id.*, at Arts. 144-147.
96. *Supra* note 6.
97. There is a Chinese tradition of court-room dramas that is still very much alive in Taiwan and Hong Kong. I do not know if it is the beneficiary of the post-Gang-of-Four thaw in the PRC. But these dramas are based on the traditional Chinese legal procedure of the Empire. The magistrate, who combines all governmental functions at the district level, acts as detective, judge, and prosecutor. The best known example in English of the sorts of stories that are dramatized (or redramatized since they were plays before they were stories) are those translated by R. H. van Gulik in such books as *Dee Goong An* (1949).
99. These three organizations are still clearly regarded as functioning together. Thus the Code of Criminal Procedure provides:

**Article 3**

The public security organ is in charge of investigation, provisional apprehension, and inquiry in cases involving criminal offenses. The people's procuratorate approves arrests and procuratorial proceedings (including investigation) and institutes prosecution. The people's court is responsible for trying cases. No other government organ, institution, organization, or person has the right to exercise such powers.

In the handling of criminal cases, the people's court, the people's procuratorate, and the public security organ must strictly observe the relevant stipulations of this and other laws.

**Article 4**

In handling criminal cases, the people's court, the people's procuratorate, and the public security organ must rely on the masses, base themselves on facts, and take the law as the yardstick. All citizens are equal in the application of the law. No privilege whatsoever is permissible before the law.
Article 5

In handling criminal cases, the people's court, the people's procuratorate, and the public security organ should perform their respective functions while coordinating with and restricting each other to guarantee that the law is accurately and effectively enforced.

100. There seems to be some distrust by the top level of the bottom. There are many statements that a number of people became members of the Party during the period of the Gang of Four and hence are unqualified and need reeducation.

See e.g. "It is Necessary To Grasp Education of Party Members as a Major Affair", FBIS-PRC-80-069, 8 April 1980, at P2. "We must also realize that nearly half the party members in Hubei joined during the Great Cultural Revolution. Although the great majority of them are good, they do not understand party history or basic knowledge about the party. All these things show that it is essential to strengthen education for party members."

There have been a number of complaints of "factionalism" in local party organs. See e.g. "Henan CCP Committee Holds Plenary Session", FBIS-PRC-80-065, 2 April 1980, at P6, P7; "Rectify the Party Workstyle...", id., at Q5.

I take this to be a code word for disagreement with the current line from the top. The current emphasis on Party discipline seems to me to indicate the same thing. See e.g. "Build the Party Into an Advanced and United Fighting Collective", FBIS-PRC-80-071, 10 April 1980, at L8.

101. In his address to the National People's Congress on 18 June 1979, Chairman Hua Guofeng said: "As classes the landlords and rich peasants have ceased to exist... The capitalists no longer acts as a class...we recognize that class struggle has not yet come to an end and that at the same time there is no longer any need for large scale and turbulent class struggle... But class struggle is no longer the principal contradiction in our society; in waging it we must center around and serve the central task of socialist modernization." 22 BR, 6 July 1979, at 5, 9-10. Mass ideological movements are out at least until modernization is accomplished.

102. See the discussion of the televised trial of Li Bendong for rape described in 22 BR, 10 August 1979, at 4-5

103. This was, I believe, the situation prior to 1976, and I have seen no evidence of change.

104. I recall interviewing a young man in Hong Kong in the summer of 1975 who had left the PRC illegally in January of that year. He had been a very important Red Guard and had spent some time in jail. He and his friends had become very interested in civil rights as a result of their disillusionment with the government. When he was arrested, he asked the guard whether he had a warrant as required under the law (a few well placed blows stopped that line of inquiry). The young man said that he and his friends were very upset that the then new 1975 Constitution did not have some the same provisions protecting civil rights that had existed in the 1954 constitution. He was something close to a thorough-going 19th century liberal. He had acquired these notions at considerable risk by reading banned books and discussing ideas that were totally reprehensible to the then government. Now it is very easy to have access to these ideas. If this continues to be the case and if they seem to be infectious, things could become fairly explosive. The Peking dissidents have by no means ceased to exist even though they have ceased to be very visible. See "'Beijing Spring' Activities Decide to Cease Activities", FBIS-PRC-80-065, 2 April 1980, at L1. Despite the title, the story indicates that the group still exists though it has ceased publication of the April 5th Tribune.

105. These are discussed in T-t Hsia, Guide to Selected Legal Sources of Mainland China, 75-249 (1966).


107. 11 January 1954, id., at 76.


Fan Shen (1966) describes land reform in a North China village in the years 1945-1948. This was, of course, prior to the establishment of the PRC and the promulgation of the statutes described in Hsia, supra note 103. But the procedure of sending out work-teams, having
discussions both with the masses and with the cadres, analyzing and reanalyzing the achievements of failure is a paradigm for what followed under the PRC government once it was established. Or so it seems to me.

110. See, for example, “Jiangxi Congress Meeting Stresses Public Security Prices”, FBIS-PRC-80-098, 15 May 1980, at 02-03. At the meeting of the standing committee of the provincial congress, representatives of the public security administration, the courts, and the procuratorate delivered “reports on plans for gradually putting into effect the law of criminal procedure... The meeting demanded that public security, organs, courts, and procuratorates closely cooperate fight together... to deal resolute blows at... criminal elements.” (emphasis supplied)

111. See, for example, “Guangdong’s Xi Zhongxun Discusses Hainan’s Problems”, FBIS-PRC-80-114, 11 June 1980, at P2, P3 where the First Secretary of Guangdong province said, “we must extensively launch publicity of the legal system and strengthen the concept of the legal system... Problems involving law should be dealt with by law and those involving policy should be dealt with by policy.”